***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

76-6074

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

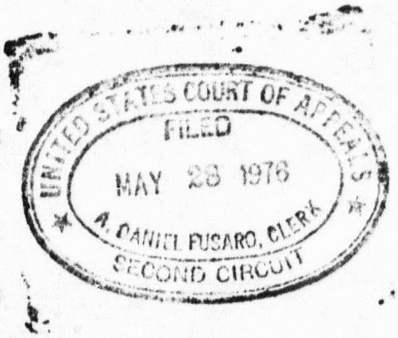
FELIX ROJAS GONZALEZ,

Plaintiff-Appellant,

-against-

SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE OF THE UNITED STATES,

Defendant-Appellee.

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PLAINTIFF-APPELLANT'S
MEMORANDUM OF LAW

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TABLE OF CONTENTS

## TABLE OF CASES AND AUTHORITIES

TABLE OF CASES AND AUTHORITIES (Cont'd)

## TABLE OF CASES AND AUTHORITIES (Cont'd)



### STATUTES AND REGULATIONS CITED



### OTHER MATERIALS:

## I. PRELIMINARY STATEMENT

This is an appeal from a judgment and order of the United States District Court for the Eastern District of New York (BRUCHHAUSEN, J.) affirming the denial of Social Security disability insurance benefits to plaintiff-appellant.

The opinion below has not been officially reported.

## II. ISSUES PRESENTED

1. Was the denial of Social Security disability benefits to the plaintiff-appellant correct, when the administrative agency ignored the plaintiff-appellant's subjective symptoms and the combined effect of his physical and mental impairments?

2. Was there substantial evidence for the administrative agency's conclusion that there is work available in the national economy for a person with plaintiff-appellant's impairments and limitations?

3. If the decision of the administrative agency should not be reversed, is there good cause for remanding the case for taking additional evidence?

## III. STATEMENT OF THE CASE

This is an appeal from a judgment and order of the District Court affirming the decision of the defendant-appellee SECRETARY OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES denying Social Security disability benefits to plaintiff-appellant.

Plaintiff-appellant FELIX ROJAS GONZALEZ is a 55-year old former laborer (Rec. 19). He is Spanish-speaking and knows little English (74). He went to school only through the second grade (74); he has no other education or training (74). He is illiterate in English (74).

Appellant's work history consists entirely of heavy manual labor. He was a farm worker on tobacco and sugar cane farms for twelve years in Puerto Rico. Since his arrival in the United States, appellant has done heavy industrial work only. He last worked as a packaging machine operator, binding together loads of mattress stuffing and garments, a job which required frequent heavy lifting and carrying (158). He also worked in a furniture factory, a job which also required lifting and carrying of furniture parts (159).

Appellant last worked in June, 1971 (61) when he was injured in an accident at work. He fell 25 feet from a platform and hit his head and shoulders. He was hospitalized in the Brooklyn Hospital which diagnosed his condition as a com-

pression fracture of the dorsal vertebrae of the spine, and a cerebral concussion (171).* After the accident, appellant received workman's compensation benefits (131), and then disability assistance from the Department of Social Services (62).

The appellant applied for disability insurance benefits on September 9, 1971 (130-132). His initial application was denied on November 4, 1971, and again on reconsideration on August 22, 1972 (141). Appellant requested a hearing which was held on September 24, 1973.

The decision after hearing, issued on October 30, 1973 denied appellant benefits. The Administrative Law Judge found that the appellant's accident resulted in "severe injury" (21) and that he is physically unable to return to his previous jobs (21). But the Administrative Law Judge concluded that appellant is nonetheless able to do various sedentary jobs and therefore is not disabled (24).

Appellant appealed to the Appeals Council which granted his request for review, but again denied appellant benefits on the grounds that he had no significant impairment and could perform jobs such as janitorial or bench assembly jobs (5-8).

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*As the medical evidence is discussed at length in the body of the brief, it is not summarized here.

Having exhausted all administrative remedies, appellant then appealed to the United States District Court for the Eastern District of New York. On February 13, 1976 both appellant and the defendant-appellee SECRETARY OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES moved for judgment on the pleadings, and on February 18, 1976, the Court below (BRUCHHAUSEN, J.) granted the defendant's motion, and dismissed the complaint. The Court in its opinion found that the record was "replete with medical evidence, supporting the findings of the Secretary" and that the medical examinations of the appellant "proved negative." (Opinion, pg. 4). The Court did not discuss the plaintiff-appellant's alternative motion for remand. Plaintiff-appellant filed a notice of appeal to this Court, and appeals from every part of the decision below.

## IV. STANDARD FOR JUDICIAL REVIEW

An opportunity for judicial review of the defendant's final decision on a disability insurance claim is provided in 42 U.S.C. §405 (g), as follows:

> The court shall have power to enter upon the pleadings and a transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the case for a rehearing. The finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. . .

However, as was reaffirmed by the Eighth Circuit in Yawitz v. Weinberger, 498 F. 2d 956 (1974), substantial evidence means more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id., at 957. See also Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 487-488 (1951), Richardson v. Perales, 402 U.S. 389, 401 (1971).

Further, the Court is not bound to accept the Secretary's conclusions of law where he has failed to employ the proper legal standard in making his determination, and the Secretary's legal conclusion based on his fact finding "are reviewable in their entirety" Adams v. Weinberger, 521 F. 2d 656, 658 (C.A.2, 1975), Herbst v. Finch, 473 F. 2d 777 (C.A.2, 1972), Selig v. Richardson, 379 F. Supp. 594, 599

(E.D.N.Y., 1974). And, the Courts have emphasized that the Social Security Act is remedial or beneficient in purpose, and, therefore, to be "broadly construed and liberally applied" Gold v. Secretary of H.E.W., 463 F. 2d 38, 41 (C.A.2, 1972), Cutler v. Weinberger, 516 F. 2d 1282 (C.A.2, 1975).

For these reasons the Courts in disability cases frequently emphasize their duty "to scrutinize the whole record in a case to determine whether the conclusions reached are rational," Burrell v. Finch, 308 F. Supp. 264, 265 (D. Kans., 1969) and "to examine meticulously the evidence no matter how burdensome that duty is because of the helter-skelter nature of the records in these [disability] cases," Mefford v. Gardner, 383 F. 2d 748, 761 (C.A.6, 1967). See also Gardner v. Brian, 369 F. 2d 443, 445 (C.A.10, 1966).

## V. THERE IS NO SUBSTANTIAL EVIDENCE THAT AN INDIVIDUAL SUFFERING FROM APPELLANT'S PAIN AND IMPAIRMENTS COULD ENGAGE IN GAINFUL ACTIVITY

An individual, insured under the Social Security Act, is entitled to disability benefits under the law:

> If his physical or mental impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . . 42 U.S.C. §423 (d) (2) (A).

In this case, it has been conceded by the defendant-appellee that the appellant could not resume his former, heavy work. As the Administrative Law Judge held:

> That claimant sustained a severe injury with residual losses of motion in June, 1971 and according to Mr. Lipton's [the vocational expert] testimony is unable to work at his previous jobs are not in dispute. I so find. (21).

The question then comes down to whether there exists in the national economy other work which appellant is capable of performing. If there is no such work that the appellant could do, he is entitled to benefits, 42 U.S.C. §423 (d) (2) (A).

There is no substantial evidence that appellant maintained the capacity to do other work. The Appeals Council's conclusion to the contrary is based on a view of the evidence which erroneously excludes from consideration appellant's pain and subjective symptoms, several significant mental and physical impairments of appellant, and appellant's own treating physicians' reports. As the Courts have held again and again in reversing the Secretary's decisions, if "reliance has been placed upon one portion of the record to the disregard of overwhelming evidence to the contrary, the Courts are . . . bound to decide against the Secretary" Thomas v. Celebrezze, 331 F. 2d 541, 543 (C.A.4, 1964). By ignoring the evidence of appellant's actual pain, and the effect of his impairments in combination, the Secretary applied an incorrect legal standard and must be reversed.

(A) The Secretary Ignored The Appellant's Pain

It is well established that pain can cause disability under the Social Security Act. See Ber v. Celebrezze, 332 F. 2d 293 (C.A.2, 1964), Spivak v. Gardner, 268 F. Supp. 366 (E.D.N.Y., 1966), Bittel v. Richardson, 441 F. 2d 1193, 1195 (C.A.3, 1971), Santiago v. Richardson, 345 F. Supp. 438 (E.D. Pa., 1972); see, generally Annotation "Pain as Disability" 23 A.L.R. 3rd 1034.

The record is replete with evidence, ignored by the Secretary, that appellant suffers from chronic severe back pain which would prevent him from working. In fact, the Secretary's vocational witness testified:

> [if] he has severe pain, which is very difficult for any man, then to continue in any type of employment. My answer would be that he's not employable. (89-90)

The records include considerable evidence of the pain endured by appellant and no contravening evidence - - there is no evidence at all that appellant does not suffer the pain he claims.

(1) The report of the Brooklyn Hospital dated June 26, 1971 notes that "since awakening [from unconsciousness] he has had headaches and pain in the middle of his back . . . there is pain and tenderness diffusely over the thoracic spine and scalpulae and over the tops of both shoulders, with limitation of motion over the thoracic and cervical spine. Tenderness is exquisite and most acute over the body of D3 and in the neighborhood of D7 and D8." The report noted improvement during his hospital stay, but found he "had still considerable pain." (171)

(2) The medical report of Eugene J. Rogers dated August 17, 1971 notes that appellant was "complaining of continuous pain in lower neck worse on upward grazing, tender-

ness . . ." and diagnosed a compression fracture of one of the vertebrae, a questionable fracture of another, and fibromyositis. A right heel lift, heat, and exercise were recommended (172).

(3) The report of Dr. Burman dated September 24, 1973 indicates the appellant complained of pain which prevented him from working (201). On examination the doctor found "increase in rounding of the dorsal spine . . . some pain in the [illegible]. The lumbar spine is flattened and tight. Flexion of the spine was slowly done to 120°." The doctor found limitation of bending and that "tenderness was present over the lumbo-sacral area". His diagnosis was "healed fractures of D2, D4, and D8 with painful dorsum rotundum and continuing low back derangement" (203).

(4) The report by Dr. Burman dated November 20, 1973 notes that appellant "says he still has pain in his neck, head and back". (197) The report found extension of the neck was limited and "painful" and on examination "tenderness was present along the length of the lumbar spine". The doctor concluded that appellant "is still unable to work" and recommends neuropsychiatric consultation. (197)

(5) The report of Dr. Thomas Guthrie dated June 12, 1974 notes that the appellant "has had posterior headache and posterior cervical pain. . . . He has diffuse pains up and down his spine. He has pains in the lower abdomen." (205)

The doctor found no neurological disease but diagnosed "severe chronic anxiety state". (207)

(6) The record is replete with evidence of treatment in an unsuccessful effort to control the pain, including massage treatments three times a week (146), hot packs (161, 165), ultrasound (161, 168), medication (163), such as analgesics muscle relaxants (167), sedatives (184), back brace (203), and physical therapy (203).

Further, there is the appellant's own testimony which is of crucial importance, because as the Court noted in Ber v. Celebrezze, supra, at 299

> It is common knowledge that physical phenomena of a debilitative nature may work differing degrees of hardship on different persons; and, too, that even where the amount of hardship experienced is roughly the same, persons subjected to it will bear up under it differently.

See also Silcox v. Richardson, 331 F. Supp. 460, 465 (D.C. Va. 1971) and Hughes v. Richardson, 342 F. Supp. 320, 344 (D.C. Mo., 1971) in which testimony of the claimant was an important factor in the Court's finding disability based on constant pain.

The appellant testified at his hearing that he had "a lot of pain" (82), and that he has pain on standing, on sitting, when he walks and lies down (82-83). "The pain never goes away. I always, always have it." (84) The record reveals

that plaintiff continuously complains of severe, unremitting pain (146, 163, 209, 219).

In the face of all of the evidence of severe constant pain, it is astonishing that the Appeals Council's final decision in the case does not mention pain. The opinion of the Administrative Law Judge specifically refuses to make any finding on the issue of the plaintiff's credibility (23). The Administrative Law Judge based his conclusions as to the plaintiff's capacities on "his own admission of his ability to walk, stand, sit and use public transportation". (23) These "admissions" were allegedly made to Dr. Irwin Nelson, who did a single orthopedic consultative exam. (174) But it is not clear from the report whether the appellant said he could sit for a half hour, stand for three hours, and walk three blocks, or whether the doctor assumed this based on other information (174). The report does not indicate whether the plaintiff spoke English or Spanish to the doctor, and who, if anyone, translated. Finally and most importantly, the alleged admissions as to capacity are obviously not in any way an admission that these activities were possible without pain. As in the case of Spivak v. Gardner, supra, at 371. "Plaintiff never claimed that he was not able to walk, however, only that he had severe pains in his legs which made it impossible for him to hold down a steady job."

At best, the doctor's report says nothing at all one way or the other about pain. It certainly is not substantial evidence or any evidence that the appellant does not suffer pain. Nor is there any other evidence suggesting that the appellant did not suffer pain as severe as he described. Here as in Combs v. Weinberger, 501 F. 2d 1361, 1363 (C.A.4, 1974) the Appeals Council "did not even acknowledge the claimant's testimony, its summary of the evidence omits all mention of Combs' description of his disability". By ignoring the evidence of pain, the Appeals Council applied an incorrect legal standard for determining disability, and the decision of the Council must be reversed. In Miracle v. Celebrezze, 351 F. 2d 361, 374 (C.A.6, 1965), the Court observed

> 'Well reasoned opinions and the obvious purposes of the Act compel that great consideration be accorded to that merciless entity called 'pain'. The fact that some extraordinary individuals can bear it and perform unflinchingly does not mean that such 'heroics' is the standard.' The criterion is not even the standard of the ordinary man or the average man; the standard is the individual claimant himself, with all his personal assets and liabilities.

The Court concluded:

> If a person is unable except under great pain to engage in any substantial gainful activity in which he might be employable, taking into consideration his age, training, work

> experience and physical and mental capacities, he is deemed disabled for purposes of the Social Security Act. Id.

(B) The Secretary Failed To Consider The Combined Effect Of Appellant's Impairments

The Courts have emphasized that "all complaints [of a claimant] must be considered together in determining [a claimant's] work capacity [cite omitted] Gold v. Secretary of H.E.W., supra, at 42. See also Dillon v. Celebrezze, 345 F. 2d 753 (C.A.4, 1965), Hicks v. Gardner, 393 F. 2d 299, 302 (C.A.4, 1968). Despite this rule, the Appeals Council decision indicates that the appellant's mental and physical impairments were considered separately. The decision first considers the appellant's back impairments and concludes they are not disabling, and then separately considers his mental problems and determines these are not independently disabling (6, 7). But these conditions must be considered together. The evidence shows that the appellant's chronic anxiety state is related to his back problem, and may exacerbate the symptoms from which he suffers. It was error to ignore this, Ber v. Celebrezze, supra. As the Court held in Silcox v. Richardson, supra, at 466

> Although the hearing examiner's individual finding, for example, that the claimant had no mental impairment itself severe enough to preclude gainful employment was proper, it is the cumulative

effect of claimant's impairments that determine disability under the Act.

The evidence shows that appellant suffers from a "chronic anxiety reaction" (205), which the Secretary's own neurologist consultant characterized as "severe" (207). While none of the physicians found psychosis, it was noted that he did have "moderately severe" constrictions of interests (211), and probably "a behavior disturbance of a mild nature" (216). Most significantly, Dr. Korobow noted "a tendency towards hysterical symptomatology". (215) Thus the evidence provides an additional psychiatric basis for the pain which appellant uncontrovertedly suffers. The Secretary ignored this evidence because he erroneously failed to consider <u>together</u> the appellant's mental and physical impairments, and symptomology.

The Secretary also ignored completely uncontroverted evidence of other significant impairments, related to appellant's accident. The Secretary does not mention either in the decision of the Administrative Law Judge or the Appeals Council the evidence of osteoporosis found by the appellant's treating physician's x-ray examination (200). This oversight was quite serious, since under the Secretary's regulations, osteoporosis is a disabling impairment, 20 C.F.R. Subpart P, Appendix §1.05B. Nor is there mention of the appellant's condition diagnosed as "diffuse fibromyositis of the back"

(169), although this condition, defined as a "chronic inflammation of a muscle with an overgrowth, or hyperplasia, of the connective tissue,"* is a significant and obviously painful impairment. The Appeals Council also ignored the evidence that appellant suffers from epicondylitis** of the elbow, (167), continuing low-back derangement (204), headache and lightheadedness. (206) Regardless of whether these impairments independently are disabling, they must be considered together, to determine their effect on appellant, Cutler v. Weinberger, supra, at 1285. Failure to do this is reversible error.

The Secretary also ignored the conclusion of the New York City Department of Social Services that appellant is disabled (62). While this determination is not binding on the Secretary, "it is entitled to some weight and should be considered." Cutler v. Weinberger, supra, at 1286.

The Secretary also erred in the respective weight given to those limited portions of the record which were considered. For example, the Appeals Council found there was "no definite evidence of fracture" and based its conclusion of no disability largely on this finding. The finding of no definite frac-

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*Stedman's Medical Dictionary, 22nd Edition (1972), page 469.

**Epicondylitis is an infection or inflammation of an epicondyle, a projection from certain bones. See Stedman's op cit, page 420.

ture is based not on a medical report actually in the record, but on a written abstract obtained by a social security employee, of undisclosed capacity, on a field trip to the Workmans Compensation Board. (167) The abstract says that Dr. Ebin says he saw no definite fracture. But the two other doctors whose reports are abstracted did diagnose fracture (Dr. Rogers) or "possible compression fracture" (Dr. Frider) (167-169). Also, the hospital where appellant was actually hospitalized and treated for 18 days found "compression fracture of dorsal vertebrae" as their final diagnosis, (171) and this diagnosis was confirmed by Dr. Springer's report noting post fracture syndrome (185) and Dr. Burman's diagnosis of "healed fractures of D2, D4, and D8 with painful dorsum rotundum (203). Both Dr. Burman and Dr. Springer, in fact, concluded that the appellant is unable to work (185, 197). These opinions by treating physicians are entitled to greater weight than impressions of a doctor who sees the claimant only once,* Selig v. Richardson, 379 F. Supp. 594, 601 (E.D. N.Y., 1973).

But in any case the precise diagnosis of appellant's impairment is not at issue. There is doubt, as the Administrative Law Judge found, that the appellant "sustained a

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*The standard used by the Secretary to weigh the evidence here seems to be whether the evidence favored the claimant or not. Thus Dr. Ebin's finding of no definite fracture is accepted, but his finding of scoliosis is inexplicably not accepted (167).

severe injury with residual losses of motion" (21), and the real issue is what effect this injury had on the appellant, regardless of the ultimate diagnosis of the impairment. The question of the effect of a claimant's impairments "must be directed to that particular individual, not to a theoretical average man or even to an average claimant". Dillon v. Celebrezze, supra, at 757.

It is not necessary to sort out the medical evidence to determine whether appellant's pain is caused by one factor or the other or whether his back was fractured, as his treating physicians concluded, or not fractured, as the Secretary concluded. The issue here is not causation but the results of all appellant's impairments in combination, Branham v. Gardner, 383 F. 2d 614 (C.A.6, 1967). When the results of the impairments are considered (which the Secretary and the Court below erroneously failed to do) it is obvious that this particular appellant cannot work at any job available to a person of his age, education and training. There is no reason to doubt his claim of pain, substantiated by all the medical examinations, and explained by his back injuries and a mental condition which apparently aggravates and exacerbates the pain he feels.

A claimant is not required to prove that he is disabled "beyond a reasonable doubt". Thomas v. Celebrezze, supra. Here appellant more than met the appropriate burden of proof to establish disability; and it was error to deny him benefits.

(C) There Is No Substantial Evidence That There Is Other Substantial Work Available In The National Economy For A Person With Appellant's Limitations

It is now established that when a claimant shows inability to resume his former employment, the burden is on the Secretary to come forward with evidence of capacity to perform other jobs, Meneses v. Secretary, 442 F. 2d 803 (D.C. Cir., 1971), Hicks v. Gardner, supra, at 301 (C.A.4, 1968); see generally Annot. 22 A.L.R. 3d 440. Here, the appellant's physical inability to resume his former employment is not in dispute (21). To attempt to meet the burden of coming forward with evidence of other jobs appellant could do, the Secretary relies on the testimony of his own "vocational expert". The expert used was the director of the Bulova School of Watchmaking, a position he has held since 1951. (179) Based on the expert's testimony the Secretary concluded that there were various jobs appellant could do, such as janitorial or bench assembly jobs (8).

1. The vocational expert did not consider all of appellant's limitations

The testimony of the expert does not support the Secretary's finding, since the expert's testimony was in response to hypothetical questions which did not take into account all of appellant's impairments and pain. The hypothetical question simply does not described the appellant.

The vocational expert was asked about job possibilities for an individual of appellant's age and education on the rather confusing assumption that he

> is able to sit for half an hour, stand for three hours, walks - - walk approximately 4 blocks, unable to lift above 10 pounds in weight but is able to use other transportation [sic], that he can bend over forward 55 degrees, . . . he can bend sideways 20 degrees each way . . . and he has full range of motion of the shoulders, elbows and wrists, good grasp of the hands . . . lift up to 30 pounds although he cannot do it repetitively; and he cannot do a job which would require repetitive bending and stooping - - or stooping. But he can sit, stand or walk within the limitations I've given you; and he has no impairment of either fine or gross manipulations of the hands . . . once an hour he may stand for a short period. (90-91).

In response to this hypothetical, the vocational expert listed various assembly jobs and light janitorial work which he testified could be done by an individual with the characteristics listed in the hypothetical question.

It is obvious from the record the hypothetical question does not adequately described the appellant. Most significantly, the question omits any mention of the appellant's pain. As is discussed at greater length supra Point V, (A), pain is an important factor which must be considered in making disability determinations. The case of Taylor v. Gardner, 297

F. Supp. 743 (N.D. Ill., 1969) is exactly on point. In Taylor the Court reversed a decision denying disability benefits because the hypothetical question asked the vocational expert ignored the claimant's subjective pain from moderate osteoarthritic changes. The same result was reached in Haskins v. Finch, 307 F. Supp. 1272 (W.D. Mo., 1969). In Haskins v. Finch, as here, the expert opinion relied on

> "was unsound, because, among other reasons . . . the testimony rendered by the vocational expert was not based on all of the medical evidence of record, but rather upon "hypotheticals" posed by the hearing examiner, by which the expert was required to assume that the conclusary findings of first one, then the other, of the medical examiners of record were true, when such separate findings ignored pain and other factors required to be considered, 307 F. Supp. at 1283.

her, the hypothetical question put to the vocational expert did not include the psychiatric impairments of the appellant. Of course, most of the evidence relating to this condition was obtained later by the Appeals Council, but this alone requires at least a remand. As the Court held in Campbell v. Richardson, 338 F. Supp. 1186 (E.D. Tenn., 1972), an answer to a hypothetical question

> which did not describe Mr. Campbell's true physical impairments, is insufficient to lend substantial support to the ultimate findings of the defendant-administrator. Id. at 1188.

See also Brinker v. Weinberger, 522 F. 2d 13 (C.A.8, 1975) reversing a decision denying disability benefits when the vocational expert did not have an opportunity to comment on evidence obtained after the hearing.

2. There is no evidence that the jobs allegedly available exist in substantial numbers

The testimony of the vocational expert is defective in another respect also. The law requires substantial evidence that the work which is available to a person of appellant's impairments "exists in significant numbers either in the region where such individual lives or in several regions of the county". 42 U.S.C. §423 (d) (2) (A), although there is no requirement of showing an actual vacancy exists or that the appellant would actually be hired, Id.

The expert's testimony is defective because even if the appellant had no other impairments than those listed in the Administrative Law Judge's hypothetical, there is still no substantial evidence that jobs exist in "significant numbers" for a person with these impairments. There is no substantial evidence for the Secretary's finding that appellant "is able to perform jobs which are present in significant numbers in the region where he lives, such as janitorial and bench assembly jobs" (8). The testimony as to janitorial jobs is especially flimsy: the expert testified that based on his own "guesstimate" there were 3000 to 5000 such jobs (100),but he

could not say how many were the "light" janitorial jobs which appellant allegedly could do, except that he had "seen" such jobs at the watch repair school he directs (101). He admitted he could give no statistics. (101) Indeed, at the hearing even the Administrative Law Judge ruled out light janitorial jobs "because the record evidence is not so substantial as to tell us how many". (102) But he subsequently reversed himself and apparently relied on the expert's "quesstimate" that 3-5000 "light" janitorial jobs were available to persons such as appellant.

As to bench assembly jobs, the other job category theoretically available to appellant, the expert's testimony was also unsound. While based on his own "interpolation" of Labor Department "interim projects 1968-1980" (97), the expert did not list a single specific job within the bench assembly category which appellant could do despite repeated questioning (118-120). The expert insisted his conclusion that he could find some job for appellant derived from his experience, (119) but this is not substantial evidence that there are significant numbers of jobs available to persons with the impairments listed in the hypothetical. His testimony was speculative and uncertain, and cannot support the Secretary's finding. As the Court of Appeals held in Gardner v. Earnest, 371 F. 2d 606, 610 (C.A.4, 1967):

> Arm-chair speculation, even by vocational experts, is insufficient in the absence of any evi-

> dence that employers in the area have hired persons with the claimant's limitations or would be willing to do so. Theoretical expertise untarnished by any field investigations is not enough.

Similarly in Gardner v. Stewart, 361 F. 2d 827 (C.A.4, 1966) the Court affirmed a reversal of the Secretary's decision on the ground that the Secretary does not meet his burden without verified evidence of the actual existence of jobs for a person in the appellant's position. Judge Friendly observed in Kerner v. Flemming, 283 F. 2d 916, 921 (C.A.2, 1960), "Mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is availalbe". As in Brinker v. Weinberger, supra, the vocational expert's testimony "indicates only what is conceivable and fails to adequately consider [claimant's] actual performance ability to realistically engage in substantial gainful employment." Thus the expert's testimony fails to meet the Secretary's burden of showing what jobs are available to a person such as appellant, concededly unable to return to his former work.

## VI. IF THE COURT DOES NOT REVERSE THE DECISION BELOW, THE MATTER SHOULD BE REMANDED FOR TAKING ADDITIONAL EVIDENCE

Appellant has urged that he has more than met his burden of proof to establish disability, and there is no substantial evidence to support the Secretary's contrary conclusion. Under these circumstances, benefits may be awarded without a remand, Gold v. Secretary, supra, at 44. But even in the absence of such proof, the Secretary's finding should not be affirmed. If the Court does not reverse the determination below, it should at least remand for the taking of additional evidence. The court has discretion to do this under the Act "for good cause shown" 42 U.S.C. §405 (g).

Some of the additional evidence appellant would introduce on remand relates to his tuberculosis. While one report mentions in passing that he is being treated for tuberculosis from which his mother and two siblings died (212-20) no effort was made by the Secretary or appellant's former counsel to obtain these records. Possibly appellant's counsel at the time felt the records were unnecessary in view of the other overwhelming evidence of disability, but the failure to obtain these records remains an error. Tuberculosis alone can be disability under the Act, 20 C.F.R. subpart P, App. §§ 3.00 (b), 3.08; Jackson v. Secretary, 319 F. Supp. 385 (N.D.

Ohio, 1970), and even minimal tuberculosis can affect an individual's work capacity.

There are additional reasons justifying a remand here. There was an apparent unsuccessful attempt to work, referred to briefly in the social workers report (219) which occurred after the hearing. Such attempts are an important factor in disability determinations; and are entitled to considerable weight in making a final decision, see, e.g. Walston v. Gardner, 381 F. 2d 580, 586 (C.A.6, 1967). But the effort to work was ignored by the Secretary.

Further, as discussed above, the "vocational expert" did not include the appellant's psychiatric difficulties, shown in later reports, when he testified. This alone requires at least a remand, Campbell v. Richardson, supra, 338 F. Supp. at 1188. As the Court noted in Jacobson v. Folsom, 158 F. Supp. 281 (S.D.N.Y., 1957):

> To deny plaintiff's claim without the benefit of this evidence might very well deprive a meritorious claimant of the ameliorative benefits conferred by the 1954 amendment. In view of these dire consequences, I would think that the legislative purpose and intent can be better served by permitting plaintiff to be heard on this additional evidence.

See further Cutler v. Weinberger, supra, at 1285.

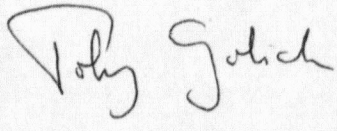
For these reasons, if the Court does not reverse the decision below, the matter should be remanded for taking additional evidence.

## VII. CONCLUSION

For the above reasons, the decision below denying disability insurance benefits to plaintiff should be reversed. In the alternative, the matter should be remanded to the Secretary to take additional evidence.

Dated: May 27, 1976
Brooklyn, New York

Respectfully submitted,



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AFFIRMATION OF SERVICE BY MAIL

YVONNE LEWIS , an attorney duly admitted to practice before the courts of the State of New York, of counsel to JOHN C. GRAY, JR., BROOKLYN LEGAL SERVICES CORPORATION B, attorney of record for a party herein, hereby affirms, under penalties of perjury, the truth of the statement that, on the 28th day of May, 1976, she served a true copy of the within PLAINTIFF-APPELLANT'S MEMORANDUM OF LAW on each addressee listed below at each address listed below, said address(es) being the address(es) designated by each addressee for that purpose, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within New York State, addressed to:

DAVID G. TRAGER
United States Attorney
Attorney for Appellee
225 Cadman Plaza East
Brooklyn, New York 11201
Attention: CHRISTOPHER JENSEN

Yvonne Lewis
YVONNE LEWIS

Dated: May 28, 1976
Brooklyn, New York